

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 452.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW
YORK, PETITIONER,

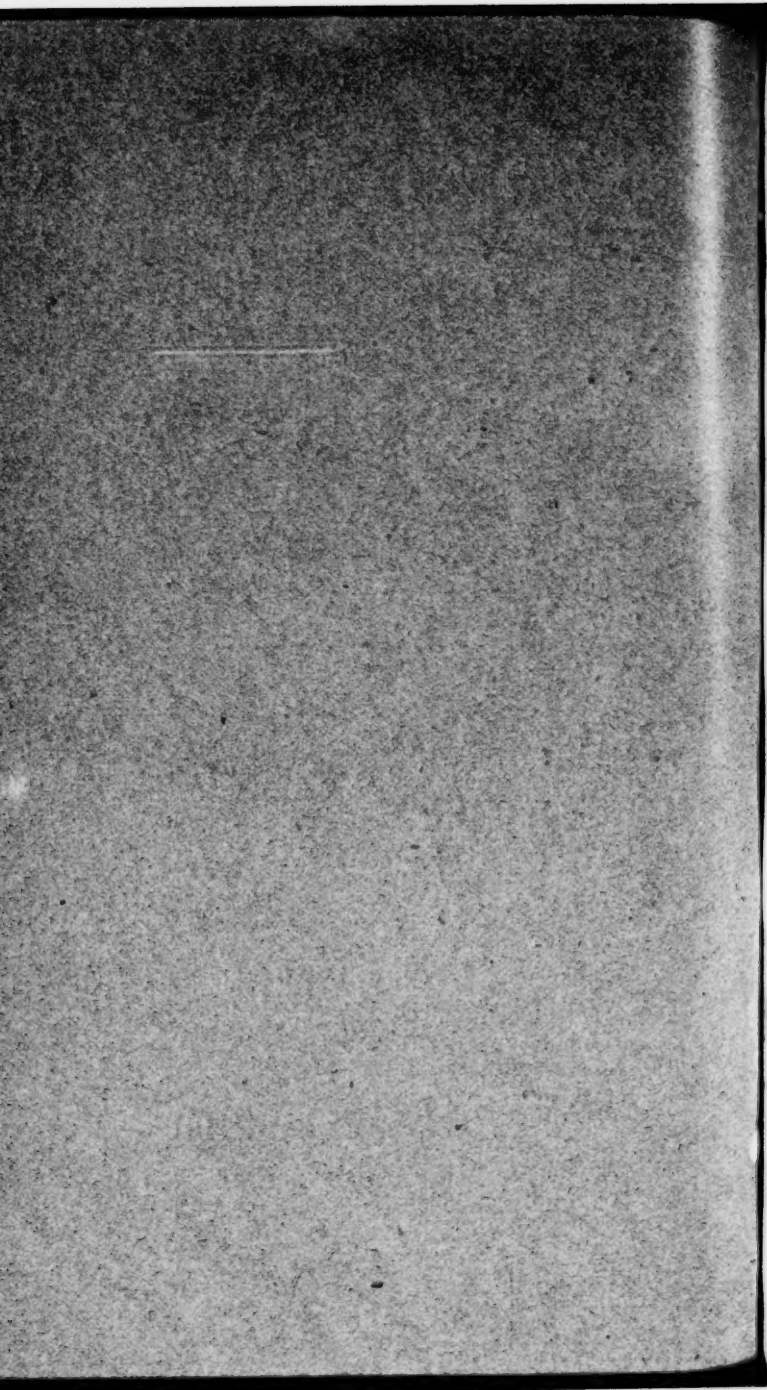
vs.

BESSIE F. SEARS, AS EXECUTRIX OF STEPHEN P. SEARS,
DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1899.
CERTIORARI AND RETURN FILED MAR 10 1900

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1 In the Circuit Court of the United States for the District of Washington, Western Division, July Term, 1898.

Be it remembered that on the twenty-eighth day of September, 1898, there was duly filed in said circuit court of the United States for the district of Washington, western division, a complaint in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	}
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, De-	}
fendant.	

Complaint.

Comes now the above-named plaintiff, and for her cause of action against the defendant above named complains and alleges:

I.

2 That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York for the purpose of carrying on a life-insurance business. Its principal place of business is in the city of New York in said State of New York.

II.

That the plaintiff is, and during all the times herein mentioned was, a resident and citizen of the State of Washington.

III.

That on or about the eighteenth day of May, 1891, the said defendant, in consideration of the payment to it by one Stephen P. Sears of the sum of four hundred ninety-one dollars, made, executed, and delivered in said city and State of New York a certain contract of life insurance wherein and whereby it insured the life of said Stephen P. Sears in the sum of ten thousand dollars. The defendant in said contract to pay to said Stephen P. Sears, his executors, administrators or assigns, upon acceptance of satisfactory proofs at its home office of the death of said Stephen P. Sears, said sum of ten thousand dollars. That the application of said policy contained the agreement and condition that the same was made subject to the charter of the company and the laws of the State of New York. That said application is not in the possession of plaintiff, but in that of the defendant. A copy of said policy is attached to this complaint marked "Exhibit A" and made a part hereof.

IV.

That on the thirtieth day of March, 1898, said Stephen P. Sears died in the city of Tacoma, State of Washington.

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V.

That said Stephen P. Sears in his lifetime made and published his last will and testament, wherein he appointed Bessie F. Sears executrix thereof, to act without bond. That on or about the thirtieth day of April, 1898, said will was proved and admitted to probate in the superior court of the State of Washington in and for the county of Pierce, and on the — day of —, 1898, plaintiff was appointed by the said court executrix thereof and duly qualified and entered upon the discharge of her duties as such executrix. And plaintiff has ever since said appointment been, and now, is the duly appointed, acting and qualified executrix of the last will and testament of said Stephen P. Sears, deceased, and that said letters testamentary have not been revoked.

VI.

That during the lifetime of said Stephen P. Sears he duly performed all the conditions of said contract by him to be performed.

VII.

That on or about the fourteenth day of June, 1898, plaintiff duly notified the defendant company of the death of said Stephen P. Sears, and inclosed in the envelope together with said notice, due and sufficient proofs of the death of said Stephen P. Sears. That on the twenty-third day of June, 1898, plaintiff received a reply to said letter acknowledging receipt by said defendant of the said notice and proofs of death. That almost three months have elapsed since the defendant received said notice and proofs of death, and said defendant has made no objection to said proofs of death, and notice of death of any character or description.

4

VIII.

That said plaintiff has duly complied with all the conditions of said contract by her necessary to be complied with.

IX.

That said plaintiff is the owner and holder of said contract, and there is now due her from the said defendant the full sum of ten thousand dollars, with interest thereon from the twenty-third day of June, 1898.

X.

That said defendant has wholly neglected to pay said policy or any part thereof.

Wherefore plaintiff prays for judgment against said defendant in the full sum of ten thousand dollars, with interest thereon from the

twenty-third day of June, 1898, at six per cent. per annum, together with her costs and disbursements in this action.

S. WARBURTON,

*Attorney for Plaintiff, 310 Fidelity Building,
Tacoma, Washington.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

Bessie F. Sears, being first duly sworn, on her oath deposes and says that she is the plaintiff above named; that she has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

BESSIE F. SEARS.

5 Subscribed and sworn to before me this nineteenth day of September, 1898.

J. H. McDANIELS,
*Notary Public in and for Washington,
Residing at Tacoma.*

EXHIBIT "A."

The Mutual Life Insurance Company of New York.

No. 453,516.

Amount, \$10,000

Man's life, limited payment. Twenty-year distribution policy.

Age, 31 years.

Annual premium for 10 years, \$491.

In consideration of the application of this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Stephen P. Sears, of Tacoma, in the county of Pierce, State of Washington, his executors, administrators, or assigns, ten thousand dollars, upon acceptance of satisfactory proof at its home office, of the death of said Stephen P. Sears during the continuance of this policy, upon the condition, and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof:

The annual premium of four hundred and ninety-one dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the eighteenth day of May in every year during the continuance of this contract, until premiums for ten years shall have been duly paid to said company.

6 In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the eighteenth day of May, A. D. one thousand eight hundred and ninety-one.

RICHARD A. McCURDY, *President.*

C. F. SCHRODER,
Ass't Secretary.

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON, *Secretary*.

Provisions, Requirements, and Benefits.

Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president and secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

7 Dividends.—This policy is issued on the twenty-year distribution plan. It will be credited with its distribution share of surplus apportioned at the expiration of twenty years from the date of issue. Only twenty-year distribution policies in force at the end of such term, and entitled thereto by year of issue, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase additional insurance, or may then be drawn in cash. After the expiration of the period of twenty years hereinabove provided for the dividend distribution periods shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period of twenty years; otherwise a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy at the end of said first period of twenty years or at the end of any subsequent period of five years elect to receive the dividends annually, the surplus applicable on this policy will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy and may be applied as hereinbefore provided.

Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the proportion of
8 the amount of this policy which the number of full year's premiums paid bears to the total number required.

Surrender.—This policy may be surrendered to the company at the end of the first period of twenty years, and the full reserve computed by the American table of mortality, and four per cent.

interest, and the surplus as defined above, will be paid therefor in cash.

Insurance, with annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the company will if requested in writing apply its cash value, to purchase, without medical examination, a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends together with paid-up annuity for life equal to three and one-half per cent. per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of said first dividend period.

Incontestability.—It is hereby further promised and agreed that, after two years from date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place, and in the manner stipulated in said policy, and that the requirements of the company as to age, and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years the payment of the sum insured by this policy shall not be disputed.

9 Notice to the holder of this policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original assignment or duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

39 B.

Man's life. Lim. paym't.

Twenty-year dist.

June, 1889.

Filed in the United States circuit court, Sept. 28, 1898.

A. REEVES AYRES, *Clerk.*

SAML D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-third day of November, 1898, there was duly filed in said court in said cause a motion to make more definite and certain in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington,
Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	} No. 609.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, Defendant.	

10 *Motion to Make More Definite and Certain.*

Comes now the above-named defendant, and moves the court to require said plaintiff to make her complaint, and particularly paragraph VI thereof, more definite and certain, in this:

That the said plaintiff be required to state whether the said Stephen P. Sears in his lifetime made or caused to be made payment of the annual premium of four hundred and ninety-one dollars, becoming due on the policy referred to in said complaint each year subsequent to the delivery of said policy at the time in said policy provided and, if payment was not so made, to require the plaintiff to state what, if any, payments of premium were made upon said policy subsequent to the delivery thereof.

II.

And in case the said Stephen P. Sears in his lifetime failed to pay all or any of the premiums falling due upon said policy subsequent to the delivery thereof, whether the said plaintiff has ever tendered or offered to make payment of any premium upon said policy unpaid at the time of the death of said Stephen P. Sears.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Copy of within motion received and due service of same acknowledged this tenth day of November, 1898.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court, Nov. twenty-third, 1898.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

11 At a stated term of the United States circuit court for the district of Washington, western division, held at the courtroom in the city of Tacoma, on Wednesday, the twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable C. H. Hanford, United States district judge, presiding in said circuit court.

BESSIE F. SEARS, as Executrix, Plaintiff, <i>vs.</i> THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	}	No. 609.
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Order Denying Motion to Make More Definite and Certain.

This cause came regularly on for hearing at this time upon motion of the defendant to make the complaint herein more definite and certain. The court being fully advised in the premises,

It is ordered that the said motion be and the same is hereby denied, to which ruling of the court the defendant excepts and its exception is hereby allowed.

Filed in the United States circuit court, Nov. 23, 1898.

A. REEVES AYRES, *Clerk.*

SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-ninth day of April, 1899, there was duly filed in said court in said cause an answer in the words and figures following to wit:

12 In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff, <i>vs.</i> THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	}	No. 609.
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Answer to Complaint.

Comes now the above-named defendant and makes the following answer to the complaint herein:

I.

For answer to paragraph III of said complaint, defendant denies that the said contract was made or delivered in the city or State of New York, and denies that said application for said policy contained the agreement or condition that the same was made subject to the charter of the company and the laws of the State of New York, but admits that there is contained in said application, the following:

"This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York."

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II.

For answer to paragraph VI of said complaint, defendant denies the same, and each and every allegation therein contained.

III.

For answer to paragraph VIII of said complaint, defendant denies the same, and each and every allegation in said paragraph contained.

IV.

For answer to paragraph IX of said complaint, defendant denies the same, and every allegation in said paragraph contained.

And by way of a further and first affirmative answer and defense herein, defendant alleges:

I.

That the said defendant is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life-insurance business.

II.

That prior to and ever since the eighteenth day of May, 1891, the defendant has been engaged in carrying on its business of life insurance in the State of Washington, and has had during the said time and now has an agent representing it in said State, conducting its said business, and during said times had its soliciting insurance agents and medical examiners residing in said State of Washington, and has complied with the laws of said State of Washington relating to foreign corporations transacting business therein.

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III.

That immediately prior to the eighteenth day of May, 1891, at Tacoma, in the State of Washington, defendant's agent solicited insurance on the life of one Stephen P. Sears, and in pursuance thereof the said Stephen P. Sears made his application to this defendant for insurance upon his life in the sum of ten thousand dollars (\$10,000). And thereupon the said Sears submitted himself at said city of Tacoma, State of Washington, to the medical examiner of this defendant and was there examined for such life insurance. That the said application, together with said physical examination of said Stephen P. Sears, was forwarded to the home office of this defendant in the city and State of New York, and thereupon said policy of life insurance upon the life of said Sears in the sum of ten thousand dollars was duly made and executed by this defendant, in consideration of the payment of the sum of \$491, to be paid to this defendant at the time and place of the delivery of said policy to said Stephen P. Sears and the payment on the eighteenth day of May of each succeeding year, until ten annual payments should be made, and that the said policy of insurance is the identical policy pleaded and set forth by way of exhibit in plaintiff's complaint.

IV.

That afterward, and on the eighteenth day of May, 1891, this defendant, through its agent residing at the city of Tacoma, duly delivered the said policy to the said Stephen P. Sears upon the payment there by said Sears to defendant of the sum of \$491, and the said policy then and there by its terms became operative and a binding contract between the said parties.

V.

That the said Sears, on the eighteenth day of May, 1892, made payment of the premium due on said policy on that date, but wholly neglected, failed and refused to pay any subsequent premium on said policy, or any part of any such premium, or anything whatever on account thereof, and never has paid anything whatever on account of premiums upon said policy subsequent to the annual premium falling due thereon in the month of May, 1892, but has wholly made default respecting said payment; and that by reason of said neglect, failure and default on the part of the said Stephen P. Sears, the said policy became lapsed and void, and was by this defendant, prior to the death of said Stephen P. Sears, declared by it to be lapsed, forfeited and void, and so entered upon the books and records of this defendant.

VI.

That on or about the thirtieth day of March, 1898, the said Stephen P. Sears died at said city of Tacoma, State of Washington.

By way of a second and further affirmative answer and defense, defendant alleges:

I.

That the said defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life-insurance business.

16

II.

That prior to and ever since the eighteenth day of May, 1891, the defendant has been engaged in carrying on its business of life insurance in the State of Washington, and has during the said time and now has an agent representing it in said State, conducting its said business, and during said times had its soliciting insurance agents and medical examiners residing in said State of Washington, and has complied with the laws of said State of Washington relating to foreign corporations transacting business therein.

III.

That immediately prior to the eighteenth day of May, 1891, at Tacoma, in the State of Washington, defendant's agent solicited insurance on the life of one Stephen P. Sears, and in pursuance thereof the said Stephen P. Sears made his application to this de-

fendant for insurance upon his life in the sum of ten thousand dollars. And thereupon the said Sears submitted himself at said city of Tacoma, State of Washington, to the medical examiner of this defendant and was there examined for such life insurance. That the said application, together with said physical examination of said Stephen P. Sears was forwarded to the home office of this defendant in the city and State of New York, and thereupon said policy of life insurance upon the life of said Sears in the sum of ten thousand dollars, was duly made and executed by this defendant, in consideration of the payment of the sum of \$491, to be paid to this defendant at the time and place of the delivery of said policy to said Stephen P. Sears and the payment on the eighteenth day of May of each succeeding year, until ten annual payments should be made, and that the said policy of insurance is the identical policy pleaded and set forth by way of exhibit in plaintiff's complaint.

IV.

That afterward, and on the eighteenth day of May, 1891, this defendant, through its agent residing at the city of Tacoma, duly delivered the said policy to the said Stephen P. Sears upon the payment there by said Sears to defendant of the sum of \$491, and that the said policy then and there by its terms became operative and a binding contract between the said parties.

V.

That the said Sears, on the eighteenth day of May, 1892, made payment of the premium due on said policy on that date, but wholly neglected, failed and refused to pay any subsequent premium on said policy, or any part of any such premium, or anything whatever on account thereof, and never has paid anything whatever on account of premiums upon said policy subsequent to the annual premium falling due thereon in the month of May, 1892, but has wholly made default respecting said payment; and that by reason of said neglect, failure and default on the part of the said Stephen P. Sears, the said policy became lapsed and void and was by this defendant, prior to the death of said Stephen P. Sears declared by it to be lapsed, forfeited and void, and so entered upon the books and records of this defendant.

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VI.

That subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy, May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and void for non-payment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said

Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof.

Wherefore, defendant prays that plaintiff take nothing by her said action, and that defendant be dismissed and recover its costs and disbursements herein.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

STATE OF WASHINGTON, } ss:
County of King, }

19 A. W. Engle, being first duly sworn, on oath deposes and says: That he is an agent of the said defendant, The Mutual Life Insurance Company of New York, duly authorized by said company to solicit insurance in the State of Washington, and as such makes this affidavit in verification of the foregoing answer on behalf of the said defendant. That he has read the said answer, knows the contents thereof and believes the same to be true.

A. W. ENGLE.

Subscribed and sworn to before me this twenty-ninth day of April, 1899.

H. J. RAMSEY,
*Notary Public in and for the State of
Washington, Residing at Seattle.*

Copy of within answer received and due service of same acknowledged this twenty-ninth day of April, 1899.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court, April 29, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

20 And afterward, to wit, on the twenty-ninth day of April, 1899, there was duly filed in said court in said cause a demurrer to answer in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington,
Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	}
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, De-	}
fendant.	

Demurrer to Answer.

Comes now the plaintiff by her attorney, and demurs to the answer of the defendant herein as follows:

I.

Demurs to the first affirmative defense of said answer on the ground that the same does not state facts to constitute a defense to plaintiff's complaint.

II.

Demurs to the second affirmative defense of said answer on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

21

III.

Demurs to said answer generally on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. Warburton,
Attorney for Plaintiff,
310 Fidelity Building, Tacoma, Washington.

UNITED STATES OF AMERICA,)
District of Washington, Western Division. }

S. Warburton, being the attorney for the plaintiff in the above-entitled cause, believes the foregoing demurrer is well founded in point of law.

S. Warburton.

Filed in the United States circuit court, April 29, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the first day of May, 1899, there was duly filed in said court in said cause an order sustaining demurrer and judgment in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington,
Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	}
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	}
Defendant.	

22 *Order Sustaining Demurrer and Judgment.*

This cause coming on to be heard on the plaintiff's demurrer to the defendant's answer herein, and the court having heard the argument of counsel thereon, and having considered the same, and being fully advised in the premises:

It is ordered that said demurrer be and the same is hereby sustained, to which ruling of the court, sustaining said demurrer, defendant by its counsel in open court at the time duly excepts, and its exception is separately allowed by the court as to each of the grounds of the demurrer.

Thereupon the defendant, by its counsel in open court, announces that it does not desire to amend its answer, but elects to stand thereon, and refuses to plead further; whereupon the plaintiff, by her counsel, moves the court for judgment in favor of the plaintiff and against the defendant upon said demurrer; and the court being now fully advised in the premises, grants said motion and orders judgment accordingly, to which action of the court in granting said motion for judgment and ordering judgment defendant at the time excepts, and its exception is allowed.

It is now therefore considered, adjudged, and decreed that the plaintiff, Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of seven thousand four hundred forty-eight and ninety-four one-hundredths dollars (\$7,448.94), with interest thereon from the date thereof, together with the costs of this action, taxed at
23 twenty-one and fifty-two one-hundredths (\$21.52) dollars, and that execution issue therefor. To which judgment and every part thereof defendant at the time excepts, and its exception is allowed.

Done in open court this twenty-ninth day of April, 1899.

C. H. HANFORD, Judge.

Filed in the United States circuit court, May 1, 1899.

A. REEVES AYRES, Clerk.

SAML D. BRIDGES, Deputy.

And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause an assignment of errors in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,)
Plaintiff in Error,

VS.

BESSIE F. SEARS, as Executrix of the Last Will and
Testament of Stephen P. Sears, Deceased, Defendant
in Error.

No. 609.

Assignment of Errors.

In the matter of the petition of The Mutual Life Insurance Company of New York, plaintiff in error.

24 Comes now the above-named plaintiff in error, Mutual Life Insurance Company of New York, on this fifth day of May, 1899, by its attorneys, Edward Lyman Short, and Struve, Allen, Hughes & McMicken, and says that in the record and proceedings in the above-entitled matter there is manifest error, of which it makes the following assignment of error in the above-entitled cause, to wit:

I.

The circuit court of the United States for the district of Washington, western division, erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer and defense of defendant and plaintiff in error, The Mutual Life Insurance Company of New York, a corporation.

II.

The circuit court of the United States for the district of Washington, western division, erred in sustaining the demurrer of the plaintiff and defendant in error to the second affirmative answer and defense of defendant and plaintiff in error, The Mutual Life Insurance Company of New York, a corporation.

III.

The said circuit court erred in sustaining the demurrer of said plaintiff and defendant in error to the answer of defendant and plaintiff in error.

IV.

The said circuit court erred in granting judgment in favor of said plaintiff and defendant in error against said defendant
25 and plaintiff in error for the amount of said judgment, or any sum, because it is manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment.

V.

The said circuit court erred in not submitting said cause to trial upon the issues formed by the pleadings.

Wherefore the said plaintiff in error prays that the judgment of

the said circuit court of the United States for the district of Washington, western division, be reversed, and that the said circuit court of the United States be ordered to enter an order reversing and setting aside said judgment, and granting a new trial in said cause.

EDWARD LYMAN SHORT AND
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Plaintiff in Error.

Copy of foregoing assignment of errors received and service of same acknowledged at Tacoma, Washington, this fifth day of May, 1899.

S. WARBURTON,
*Attorney for Bessie Sears, as Executrix,
Defendant in Error.*

Filed in the United States circuit court, district of Washington, May 5, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHER, *Deputy.*

26 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a petition for writ of error in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	} No. 609.
<i>vs.</i> THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

Petition for Order Allowing Writ of Error.

The said defendant, The Mutual Life Insurance Company of New York, a corporation, feeling itself aggrieved by the judgment entered in said cause on the first day of May, 1899, in favor of said plaintiff and against said defendant for the sum of seven thousand four hundred forty-eight and ninety-four one-hundredths dollars, and twenty-one and fifty-two one-hundredths dollars costs, in which judgment and the proceedings leading up to the same, certain errors were committed, to the prejudice of the said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prosecute a writ of error to the honorable United States circuit court of appeals for the ninth circuit, for the correction of the errors complained of, under and according to the laws of the United States, in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of

error, and that upon the furnishing of said security all further proceedings in this cause may be suspended and stayed until the determination of said writ of error by said circuit court of appeals for the ninth circuit. And further prays that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals, and your petitioner will ever pray.

Dated this fifth day of May, 1899.

EDWARD LYMAN SHORT AND
STRUVE, ALLEN, HUGHES & McMICKEN,
*Attorneys for the Defendant, The Mutual Life Insurance
Company of New York, a Corporation.*

Copy of foregoing petition for order allowing writ of error received, and service of same acknowledged at Tacoma, Washington, this fifth day of May, 1899.

S. WARBURTON,
Attorney for Bessie F. Sears, Executrix.

Filed in the United States circuit court, district of Washington May 5, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHER, *Deputy.*

28 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause an order allowing writ of error in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	} No. 609.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the court-room of said court in the city of Tacoma, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, a corporation, herein filed, praying the allowance of a writ of error to the United States circuit court of appeals for the ninth circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises.

29 The court having duly considered the same, does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant, The Mutual Life Insurance Company of New York, a corporation, of a bond according to law, in the sum of eight thousand five hundred dollars, the same shall operate as a supersedeas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this fifth day of May, 1899.

C. H. HANFORD, *Judge.*

Copy of foregoing order received and service of same acknowledged this fifth day of May, 1899.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a supersedeas bond in the words and figures following, to wit:

30 In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,	} No. 609.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

Supersedeas Bond.

Know all men by these presents, that we, The Mutual Life Insurance Company of New York, a corporation, the above-named defendant, as principal, and Jacob Furth and E. C. Neufelder of Seattle, King county, Washington, as sureties, are held and firmly bound unto Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, the above-named plaintiff, in the sum of eight thousand five hundred dollars, to be paid to said plaintiff, her executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fifth day of May, 1899.

31 The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff, in the sum of seven thousand four hundred forty-eight and ninety-four one-hundredths dollars, with interest and costs, and

Whereas, the said defendant has obtained from said court a writ of error to reverse the judgment in said action, and a citation di-

rected to the plaintiff is about to be issued citing and admonishing her to be and appear in the United States circuit court of appeals, for the ninth circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said defendant, The Mutual Life Insurance Company, a corporation, of New York, shall prosecute this said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, [SEAL.]

By SHERWOOD GILLESPIE,

Its General Agent for the State of Washington,

And by STRUVE, ALLEN, HUGHES & McMICKEN,

Its Attorneys.

JACOB FURTH.

E. C. NEUFELDER.

[SEAL.]
[SEAL.]

[Cancelled U. S. revenue stamp.]

UNITED STATES OF AMERICA, }
District of Washington, King County, } ss:

32 Jacob Furth and E. C. Neufelder, sureties on the foregoing bond, being each duly sworn, each for himself deposes and says: That he is — freeholder in said district, and that he, the said Furth, is worth the sum of eight thousand five hundred dollars; and that he, the said E. C. Neufelder, is worth the sum of eight thousand five hundred dollars, and in each case exclusive of property exempt from execution, and over and above all debts and liabilities.

JACOB FURTH.

E. C. NEUFELDER.

Subscribed and sworn to before me this fifth day of May, 1899.

A. C. BOWMAN,

United States Commissioner.

[Seal of U. S. Commissioner.]

[Cancelled U. S. revenue stamp.]

The sufficiency of the sureties of the foregoing bond approved by me this fifth day of May, 1899.

C. H. HANFORD,

Judge of said Court.

Copy of the foregoing bond received, and service of same acknowledged at Tacoma, Washington, this fifth day of May, 1899.

S. WARBURTON,

Attorney for Plaintiff.

Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*

SAM'L D. BRIDGES, *Deputy.*

33 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a writ of error in the words and figures following, to wit :

Writ of Error (Copy).

UNITED STATES OF AMERICA, ss :

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint ; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you may have the same at the said place before the justice aforesaid, on the third

34 day of June, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
*Clerk of said Circuit Court of the United States
for the Ninth Circuit, District of Washington,*
By SAM'L D. BRIDGES, *Deputy.*

[U. S. Circuit Court Seal.]

The foregoing writ is hereby allowed.

C. H. HANFORD,
*United States District Judge for the District of Washington,
Sitting as Judge of said Circuit Court of the United States
for the Ninth Circuit, District of Washington.*

Received, this fifth day of May, 1899, a true copy of the foregoing writ of error, for defendant in error, Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased.

A. REEVES AYRES,
*Clerk of the Circuit Court of the United States
 for the Ninth Circuit, District of Washington,*
 By SAM'L D. BRIDGES, *Deputy.*

[U. S. Circuit Court Seal.]

35 Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*
 SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a copy of writ of error in the words and figures following, to wit:

Writ of Error (Copy).

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said circuit court, before you or some of you, between Bessie F. Sears, deceased, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice

36 of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you may have the same at the said place before the justice aforesaid on the third day of June, 1899, that, the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and

of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
*Clerk of said Circuit Court of the United States for
the Ninth Circuit, District of Washington,*
By SAM'L D. BRIDGES, *Deputy.*

[United States Circuit Court Seal.]

The foregoing writ is hereby allowed.

C. H. HANFORD,
*United States District Judge for the District of Washington,
Sitting as Judge of said Circuit Court of the United States
for the Ninth Circuit, District of Washington.*

Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

37 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a citation in the words and figures following, to wit:

Citation (Copy).

UNITED STATES OF AMERICA, ss:

To Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the third day of June, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, western division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf

Dated the fifth day of May, 1899.

C. H. HANFORD,
*United States District Judge for the District of Washington,
Sitting as Judge of said Circuit Court of the United States
for the Ninth Circuit, District of Washington.*

[U. S. Circuit Court Seal.]

Attest:

A. REEVES AYRES,
*Clerk of said Circuit Court of the United States for
the Ninth Circuit, District of Washington,*
By SAM'L D. BRIDGES, *Deputy.*

We hereby, this fifth day of May, 1899, acknowledge service of the foregoing citation at Tacoma, Washington.

S. WARBURTON,
*Counsel for Bessie F. Sears, as Executrix of the Last
Will and Testament of Stephen P. Sears, Deceased.*

Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

In the Circuit Court of the United States for the District of
Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Tes- tament of Stephen P. Sears, Deceased, Plaintiff,	} No. 609.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, }
District of Washington, } ss :

I, A. Reeves Ayres, clerk of the circuit court of the United States for the ninth circuit, district of Washington, do hereby certify that the foregoing pages, numbered from one to thirty-eight, both inclusive, constitute and are a complete, true, and correct copy of the record, papers and all proceedings had in the above-entitled cause as the same remains of record and on file in the office of said circuit court, and that the same which I transmit constitutes my return to the annexed writ of error, lodged and filed in my office on the fifth day of May, 1899. I also hereto annex and herewith transmit the original citation in said cause.

I further certify that no opinion of the court was rendered or filed in said cause.

I further certify that the costs of preparing and certifying the foregoing transcript of record and return is the sum of \$19.95, and that the same has been paid to me in full by Struve, Allen, Hughes & McMicken, attorneys for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and the seal of the said circuit court the twelfth day of May, 1899.

A. REEVES AYRES,
*Clerk United States Circuit Court for the District of
Washington, Ninth Circuit,*
By SAM'L D. BRIDGES,

[SEAL.]

Deputy Clerk.

[Cancelled 10-ct. int. rev. stamp.]

Writ of Error (Original).

UNITED STATES OF AMERICA, ss.:

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

40 Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the third day of June, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause farther to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States, the one hundred and twenty-third.

[SEAL.]

A. REEVES AYRES,

Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, Deputy.

The foregoing writ is hereby allowed.

C. H. HANFORD,

*United States District Judge for the District of Washington,
Sitting as Judge of said Circuit Court of the United States
for the Ninth Circuit, District of Washington.*

Received, this fifth day of May, 1899, a true copy of the foregoing writ of error, for defendant in error, Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased.

[SEAL.]

A. REEVES AYRES,

Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, Deputy.

(Endorsed:) Original. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Co. of New York, plaintiff in error, *vs.* Bessie F. Sears, as executrix, defendant in error. Writ of error. Filed in the United States circuit court May 5, 1899. A. Reeves Ayres, clerk. Sam'l D. Bridges, 42 deputy. Edward Lyman Short and Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error.

Citation (Original).

UNITED STATES OF AMERICA, *ss.*:

To Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the the United States circuit court of appeals, for the ninth circuit, to be holden in the city of San Francisco, State of California, on the third day of June, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of Washington, western division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the fifth day of May, 1899.

C. H. HANFORD,

*United States District Judge for the District of Washington,
Sitting as Judge of said Circuit Court of the United States
for the Ninth Circuit, District of Washington.*

Attest:

[SEAL.]

A. REEVES AYRES,

*Clerk of said Circuit Court of the United States for the
Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, Deputy.*

43 We hereby, this fifth day of May, 1899, acknowledge service of the foregoing citation at Tacoma, Washington.

S. WARBURTON,

*Counsel for Bessie F. Sears, as Executrix of the Last
Will and Testament of Stephen P. Sears, Deceased.*

(Endorsed:) Original. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Co. of New York, plaintiff in error, *vs.* Bessie F. Sears, as executrix, defendant in error. Citation. Filed in the United States circuit court May 5, 1899. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy. Edward Lyman Short and Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error.

(Endorsed:) No. 541. In the United States circuit court of appeals

or the ninth circuit. The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, defendant in error. In error to the circuit court of the United States for the district of Washington, western division. Transcript of record. Filed May 17, 1899. Frank D. Monekton, clerk, by Meredith Sawyer, deputy clerk.

At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation) <i>vs.</i> BESSIE F. SEARS, as Executrix, etc.	}	No. 541.
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Order of Submission.

Ordered cause argued by John B. Allen and R. C. Strudwick, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendant in error, and submitted to the court for consideration and decision.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error, <i>vs.</i> BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error.	}	No. 541.
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Opinion U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, western division.

Edward Lyman Short and John B. Allen, for plaintiff in error; Struve, Allen, Hughes & McMicken, of counsel.
S. Warburton, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.
HAWLEY, *District Judge*:

The facts in this case in so far as they bear upon the question of the policy of insurance herein sued upon, being a New York contract and governed by the laws of that State as to the forfeiture of

the policy, are identical with the facts presented in *Mutual Life Insurance Company vs. Hill, ante*. The other facts presented by the pleadings are as follows:

46 On May 18, 1891, the Mutual Life Insurance Company of New York issued a policy of insurance upon the life of Stephen P. Sears in the sum of ten thousand dollars, upon which an annual premium of four hundred and ninety-one dollars was to be paid for ten years. Sears paid the first premium upon the delivery of the policy in 1891. He paid the second premium when due May 18, 1892, and the policy by its terms then became an operative and binding contract between the parties. He never paid any other premium, or any part or portion thereof. Owing to his failure to pay any further premium, the insurance company declared the policy lapsed, forfeited and void, and so entered it upon its books and records. After Sears failed to pay the annual premium due May 18, 1893, and after he was informed that said policy had been, by the insurance company, declared lapsed and void for non-payment of the premium, an agent of the insurance company applied to him to make restoration of said policy by making payment of said defaulted premium. But Sears refused to make such payment and elected to have the policy terminated, and for this reason the insurance company never took any further steps in relation to the policy by way of notice or otherwise, in order to effect the cancellation and termination thereof.

On March 30, 1898, Sears died. Prior to his death he made his will, appointing his wife, Bessie F. Sears, executrix of his estate. This will was admitted to probate, April 30, 1898, and the executrix appointed thereunder duly qualified and entered upon her duties. On June 14, 1898, the executrix notified the insurance company of Sears' death, enclosing due and sufficient proofs thereof.

47 On June 23, 1898, she received a reply from the company acknowledging receipt of the notice and proofs of death. On September 19, 1898, she commenced this action. Upon these facts, admitted by the pleadings, it is clear that the court did not err in sustaining the demurrer to the answer and rendering judgment in favor of the executrix for \$7,448.94, with interest and costs. There was no issue raised by the pleadings. The parties could not waive the provisions of the statute of New York, which expressed the conditions upon which the policy might be forfeited for non-payment of premiums. The New York statute has been regarded as indicative of the legislative will and intent that life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the mode prescribed by the statute.

Upon the authority of *The Mutual Life Insurance Company vs. Hill*, and of the authorities there cited, the judgment of the circuit court is affirmed, with costs.

(Endorsed :) Opinion. Filed Oct. 2, 1899. F. D. Monckton, clerk.

48 United States Circuit Court of Appeals for the Ninth Circuit,
October Term, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,	} No. 541.
<i>vs.</i> BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error.	

Judgment U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of
Washington, western division.

This cause came on to be heard on the transcript of the record
from the circuit court of the United States for the district of Wash-
ington, western division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by
this court that the judgment of the said circuit court in this cause
be, and the same is hereby, affirmed, with costs.

(Endorsed :) Judgment. Filed Oct. 2, 1899. F. D. Monckton,
clerk.

49 At a stated term, to wit, the October term, A. D. 1899, of
the United States circuit court of appeals for the ninth circuit,
held at the court-room, in the city and county of San Francisco, on
Monday, the ninth day of October, in the year of our Lord one
thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Hon-
orable Erskine M. Ross, circuit judge; Honorable Thomas P. Haw-
ley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation)	} No. 541.
<i>vs.</i> BESSIE F. SEARS, as Executrix, etc.	

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, ordered mandate
herein stayed until the further order of the court.

50 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, <i>vs.</i> BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error.	}	No. 541.
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Clerk's Certificate to Transcript U. S. Circuit Court — Appeals.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing forty-nine (49) pages, numbered from one (1) to forty-nine (49), inclusive, to be a full, true and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, the order staying mandate in the above-entitled cause, as the originals thereof remain and appear of record in my office, and that the same together constitutes a copy of the entire record of the case in said United States circuit court of appeals for the ninth circuit.

51 Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this fourteenth day of October, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 14, '99. F. D. M.]

52 UNITED STATES OF AMERICA, 88 :

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting :

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and Bessie F. Sears, executrix of the last will and testament of Stephen P. Sears, deceased, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of February, in the year of our Lord one thousand nine hundred.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed :] Supreme Court of the United States. No. 452, October term, 1899. The Mutual Life Ins. Co. of New York *vs.* Bessie F. Sears, executrix, &c. Writ of certiorari. Filed Feb. 15, 1900. F. D. Menckton, clerk U. S. circuit court of appeals for the ninth circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and	} No. 541.
Plaintiff in Error,	
<i>vs.</i>	
BESSIE F. SEARS, as Executrix of the Last Will and	}
Testament of Stephen P. Sears, Deceased.	

Stipulation as to Return of the Writ of Certiorari.

It is, this 16th day of February, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause, heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court, and may be received and considered by that court as the transcript of the record in said cause as though the same had been

returned by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted February 6th, 1900.

STRUVE, ALLEN, HUGHES & McMICKEN, AND
STRUDWICK & PETERS.

Attorneys for Petitioner and Plaintiff in Error.

S. Warburton,

Attorney for Respondent and Defendant in Error.

(Endorsed :) Stipulation as to return to writ of certiorari. Filed Feb. 20, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation entered into between the respective counsel, filed in the cause entitled The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, v. Bessie F. Sears, as executrix, etc., No. 541, as the original thereof remains of record in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit. Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	} No. 541.
a Corporation, Plaintiff in Error,	
v.	
BESSIE F. SEARS, as Executrix, etc., Defendant in Error.	

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 16th day of February, 1900, the

original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Seal United States Circuit Court of Appeals,
Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

[Endorsed:] Case No. 17,566. Supreme Court U. S., October term, 1899. Term No., 452. The Mutual Life Ins. Co. of New York, petitioner, *vs.* Bessie F. Sears, executrix, &c. Writ of certiorari and return thereto. Office Supreme Court U. S. Filed Mar. 10, 1900. James H. McKenney, clerk.